[1]UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Eighteenth Region

LAKEWOOD HEALTH CENTER

AND **Case 18-RC-177139**

MINNESOTA NURSES ASSOCIATION

REQUEST FOR REVIEW OF LAKEWOOD HEALTH CENTER

I. Introduction and Summary

LakeWood Health Center ("LakeWood"), by the undersigned counsel, pursuant to the Board Rules and Regulations, §102.67, requests review of the Decision and Direction of Election ("Decision") issued by the Regional Director for Region 18 on June 17, 2016. Specifically, LakeWood requests review of the Director's determination that the new position of Patient Care Coordinator ("PCC") is not supervisory within the meaning of section 2(11) of the National Labor Relations Act, 28 U.S.C. § 151 *et seq.* ("Act") and that PCCs are eligible voters. LakeWood urges the National Labor Relations Board ("Board") to find that the PCC position is supervisory and that the PCCs are not eligible voters.

On May 27, 2016, the Minnesota Nurses Association ("MNA" or "Union") filed the petition in this matter. On June 7 and 8, 2016, a hearing was held in Baudette, MN. The only litigated issue at the May 2016 hearing was that of the PCC position. In support of this Request for Review LakeWood states the following.[2]

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[2] References to the transcript are identified by page and line as "Tr. __/__." LakeWood's exhibits are identified as "E. Ex. __;" the Union's exhibits are identified as "U. Ex. __." The

II. Background, LakeWood's Operations and the Prior Unfair Labor Practice Proceedings

LakeWood operates a small, "critical access hospital" ("CAH") in Baudette, MN.[3] (Tr. 22/4 – 7) Baudette has a population of approximately 1000 and is located in Lake of the Woods County, Minnesota close to the Ontario, Canada border. (Tr. 26/1 – 16) It is the largest employer is the municipality as well as the county. (Tr. 27/20 – 21) LakeWood is certified by Medicare as a CAH and is funded on a cost-based method that facilitates its operation in a rural locale. (Tr. 23/15 – 25; Tr. 24/1 – 11) LakeWood is also an acute care hospital. (Tr. 11/12 – 18) LakeWood is owned and operated by Catholic Health Initiatives ("CHI"), which is a national Catholic health care organization that operates various facilities, hospitals and long-term care facilities throughout the country, including facilities in Park Rapids, Little Falls, and Breckenridge, MN. (Tr. 27/22 – 25; Tr. 28/1 – 6) The hospital draws most of its patients and employees from a radius of 30 to 40 miles of the hospital. (Tr. 26/17 – 18) Although licensed for fifteen (15) beds, LakeWood's patient census typically does not exceed 8 and often is a lot less. (Tr. 113/15 – 25) Of course, it functions on a 24/7 basis. (Tr. 231/1 – 3)

Given its remote location, obtaining job applicants is difficult, and LakeWood screens employment applicants carefully to minimize turnover and it seeks to hire only those applicants who will be successful at the hospital. (Tr. 26/20 – 25; Tr. 27/1 – 10) As a result, disciplinary problems are infrequent. (Tr. 27/11 – 17) Annual written evaluations are performed in September – October each year. (Tr. 28/7 – 13) Because the PCC position did not exist prior to

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transcript from the unfair labor practice hearing in cases 18-CA-161872 and 18-CA-17049 is identified as "ULP Tr. __/__."

[3] A long term care facility for between 30 and 33 residents adjoins the hospital. (Tr. 25/8 – 9) An EMT department is situated several blocks away. (Tr. 25/18 – 25)

late February 2016, the first opportunity that PCCs will have to complete these written evaluations will be in September 2016.

As the Regional Director noted in his Decision, LakeWood and the MNA are no strangers to one another. A full and fair review of this matter by the Board requires that it look back to an unfair labor practice proceeding, which only recently terminated on April 20, 2016.[4] In the fall of 2015, LakeWood withdrew recognition from the MNA for a unit that included many, but not all, of the positions that the MNA now seeks to represent. LakeWood's withdrawal of recognition led to the filing of two unfair labor practice charges. The first Case No. 18-CA-161872 challenged the withdrawal of recognition itself, and a Complaint issued. Then on March 14, 2016, the MNA filed a charge in Case No. 18-CA-170429 in which the MNA challenged what it said was LakeWood's "creation of a new supervisory position titled Patient Care Coordinators (PCCs)." (E. Ex. 49) The MNA went on to allege that LakeWood interviewed RN's for unit positions in order to fill the new supervisory positions, and implemented this position as of February 28, 2016. The Regional Director immediately consolidated this charge with a pending unfair labor practice proceeding in Case 18-CA-16172, and issued an Amendment to Complaint. The Amendment alleged, in relevant part:

> 11.(c) About mid-December 2015, Respondent announced its intent to implement a new staffing plan for acute care nursing, including the creation of a new supervisory position titled RN Coordinators (PCCs)

[4] The Hearing Officer rejected all efforts of LakeWood to place before the Regional Director facts relating to the prior ULP proceedings, and he rejected all exhibits offered by LakeWood regarding these proceedings. Nevertheless, the Regional Director took notice of the facts surrounding these proceedings. It is well established that the Board can take notice of its own records of prior interrelated litigation between the same parties. *Moulton Manufacturing Co.*, 152 NLRB 196, 207 (1965). LakeWood now draws upon information gleaned from those rejected exhibits, which are Employer Exhibits 49, 50, 51, 52, 53, and 54 ("E. Ex.") and the prior proceedings.

11.(d) From about mid-December 2015 until about January 22, 2016, Respondent interviewed and otherwise engaged in direct dealing with RNs who were part of the Unit described in paragraph 6 of the Complaint in order to fill the new supervisory positions described above in subparagraph (c).[5]

(E. Ex. 50)

LakeWood admitted allegations 11.(c) and (d). (E. Ex. 51) The hearing in cases 18-CA-16172 and 18-CA-170429 was tried from April 5 through April 7, 2016. On April 19, 2016, the General Counsel moved to dismiss the Complaint and Amended Complaint, citing the mathematical impact of the deletion of two names from a list of bargaining unit employees and the unanticipated testimony of a witness (called by the General Counsel) that did not support the General Counsel's case. (E. Ex. 52) LakeWood did not oppose this request, but the MNA did. On April 20, 2016, the Administrative Law Judge before whom these cases were tried, Melissa M. Olivero, issued an Amended Order dismissing the cases. (E. Ex. 53) No request for review was made to the Board. At no time prior to the present petition, has the MNA disavowed the position it took in the unfair labor practice cases that the PCC position was supervisory. Until his Decision, the Regional Director for Region 18 never disavowed that the PCC position was

[5] In his Decision, p. 28, the Regional Director asserts that these Complaint allegations do not allege that the PCCs are in fact supervisory; rather they merely allege that LakeWood *unilaterally* announced an intention, and then created a new supervisory position. The Director misconstrues his own pleadings. He clearly alleged the creation of a new supervisory position. During the course of the unfair labor practice case, the MNA went to great lengths to show that the PCC position was supervisory. At the unfair labor practice trial that began on April 5, 2016, the Region characterized the PCC position as supervisory. For example, Sandy Wiczek, a LakeWood RN, whom the Counsel for the General Counsel called to testify about the PCC position, said this: "They chose six persons to be like the lead of every shift, and they make – basically lead everything. They [the PCCs] direct everything I should say." (ULP Tr. 198/12 – 16) On cross examination, Ms. Wiczek explained, "Well, the PCC does – they direct the whole shift, they assign you, they assign the shift – or the next shift, they do all the call-offs, they do most of that so that RN can just take care of her patients." (ULP Tr. 205/8 – 11)

supervisory.

III. The Staffing Management Plan: Acute Care Nursing Staffing Guidelines, the Creation and Functioning of the Patient Care Coordinator Position

In October 2015, LakeWood began the rollout of a formal staffing management plan, which was entitled "Staffing Management Plan: Acute Care Nursing Staffing Guidelines" ("Acute Care Staffing Plan"). (Tr. 29; E. Ex. 1) LakeWood adopted the Acute Care Staffing Plan to provide a more formal structure for how the acute care department would work. (Tr. 29/14 – 20) The PCC position was created pursuant to, and was an essential element of, the Acute Care Staffing Plan. (Tr. 29/21 – 25; Tr. 30/1) Prior to the PCC position, LakeWood had utilized the role of "Charge Nurse." That role had never been formalized, nor had Charge Nurses been held accountable for the limited oversight they provided in this role. The Charge Nurse's sole duty was to look at staffing for a particular day and for the next shift. (Tr. 30) Under the Acute Care Staffing Plan, the Charge Nurse position was eliminated in favor of the PCC position. (Tr. 31/6 – 12) The Acute Care Staffing Plan along with the PCC position "went live" February 28, 2016. (Tr. 31/13 – 16)

LakeWood held seven meetings with its acute care staff to explain the Acute Care Staffing Plan and the new PCC position. (Tr. 31 – 33) Meetings began on October 23, 2015. (Tr. 32/8 – 25) Much of the focus of these meetings was on the PCC position. (Tr. 36/7 – 18) The PCC position was a critical component of the Acute Care Staffing Plan because instead of having 20 people (the Charge Nurses) lead the department on a shift-by-shift basis there would now only be six (6) doing this work. (Tr. 36/19 – 25; Tr. 37/1 – 2) However, only Registered Nurses (RNs) could apply to be PCCs. (Tr. 45/10 – 11) LakeWood had raised the issue of the PCC position with the MNA in contract negotiations in June 2015, but the MNA had rejected it

contending that the position was supervisory. (Tr. 45/12 – 25; Tr. 46/1 – 2) Six PCC positions were created. (Tr. 50/14 – 15) Eight (8) RNs had voluntarily applied. (Tr. 52/2 – 9)

The PCC Job Description provides, inter alia, that this job is responsible for:

- Responsible for Daily Nursing Assignments
- Coordinates daily patient care activities with acute care nursing and other related services
- Communicates with staff to assure assignment made is appropriate to promote team building and cohesiveness
- Retains overall accountability for the workflow for their shift, and remains accountable if duties are delegated to another qualified staff member

Among the "Key Responsibilities" are:

- Provides overall supervision of staff and patient care during the shift and services as the bedside leader for the nursing team during shift
- Participates in the hiring and performance evaluation processes of acute care nursing staff
- Initiates disciplinary action when appropriate, up to and including termination
- Participates in discharge planning and works collaboratively with care management team and facility leadership to achieve the best patient outcome

The Job Description specifically states:

> **Accountability:** Take full responsibility for the conduct and results of own work. Holds self/others accountable for goal attainment. Demonstrates an understanding of the link between one's own responsibilities and overall organizational goals, priorities and needs.

(E. Ex. 9)

LakeWood's Vice President of Patient Care, Danielle S. Abel, explained that the PCC position was created to give accountability to each shift's work flow by having six (6) individuals, who with knowledge about their department, acting as supervisors of employees on their shift. The old arrangement of twenty (20) Charge Nurses led to a lack of accountability, and a lack of follow-through. (Tr. 49/8 –25; Tr. 50/1 – 6) Ms. Abel explained that individuals in the PCC position would be accountable "for themselves and others on their shift." (Tr. 50/7 –

12) The Union's own witness, Jamie Johnson, who is a PCC, acknowledged her understanding of such accountability:

> Q: (by LakeWood counsel) You understand that in being accountable that you as the PCC could be accountable both positively, in terms of maybe additional pay or benefits, correct, if work was done properly?
>
> A: Correct.
>
> Q: By the same token, if work was not done properly by someone to whom you had delegated that work, that you could be held accountable negatively.
>
> A: Correct.
>
> Q: -- be it pay decrease, loss of benefits, correct?
>
> A. Yes.

(Tr. 297/2 – 14)

Applicants for the position were interviewed in February 2016. During these interviews, each applicant was asked to respond to questions directly related to the exercise of supervisory authority. (Tr. 54/16 – 17) For example, the following questions were posed to each applicant:

> Describe your previous leadership experience.
>
> Describe your level of comfort in administering disciplinary action (ex: an employee who routinely calls in or is late to work).
>
> What do you feel is the most important role of a leader?
>
> How would you transition to this role from a staff nurse position to a department director?

(E. Ex. 11 – 18)

The PCC position paid an additional 5 percent. (Tr. 65/9 – 10) It also offered guaranteed hours (*i.e.*, the PCCs were not subject to call off). (Tr. 65/19 – 20) The PCCs report to the Acute Care Nursing Manager, Joan Baade, who in turn reports to Ms. Abel; Ms. Abel reports to

LakeWood's President, Ben Koppelman. (Tr. 67/11 – 14) Subordinate to the PCCs are RNs, LPNs, and CNAs. (Tr. 69/14 – 16)

Ms. Abel described the work of the PCCs as follows. They are responsible for the day-to-day and shift-to-shift coordination of care, and the daily assignments for the nursing staff (which includes staffing and assignments of particular nurses to patients). (Tr. 67/19 – 22) It is, Ms. Abel emphasized, the role of the PCC to decide which nurse will take care of which patient. (Tr. 67/23 – 25) The PCCs are the highest ranking person present in the hospital Monday through Friday from 7:00 p.m. until 8:00 a.m. and from Friday after 5:00 p.m. until Monday at 8:00 a.m. (Tr. 68/19 – 25; Tr. 69/1 – 5)

The PCCs will participate in the hiring process. (Tr. 69/18 – 25) That they have not to date participated in the actual hiring process is attribute to the fact that the PCC position only commenced at the end of February 2016 and since this time there has only been one hiring, actually a re-hiring of an employee, who had only recently quit and did not need to go through the new candidate interviewing and on-boarding process like a normal applicant (Tr. 70/18 – 25; 71/1 – 9) The normal hiring process includes interviews that will include the PCCs; not only will the PCCs' recommendations be given weight, but the PCCs have been informed of that. (Tr. 70 – 72) The Union's own witness, PCC Johnson, acknowledged that she would be called upon to participate in the hiring (as well as evaluation process):

> Q: In addition, under the next bullet point [in reference to PCC job description], it says you would participate in the hiring and performance evaluation. Did you understand that that was – that those two items, hiring and performance evaluations, was [sic] something you would be called upon to perform?
>
> A: At some point, yes.

(Tr 298/ 20 – 25)

The PCCs transfer employees within the hospital (*i.e.,* "I want you to work in this department and with this particular patient.) (Tr. 73/12 – 25) For example, the Patient Care Assignment Sheet for May 10, 2016 shows PCC Sarah Baade making various assignments of her subordinates to various patients. (Tr. 78 – 85; E. Ex. 19[6]) On May 24, 2016, Ms. Baade assigned an employee to out-patient and ER work. (Tr. 144 – 145; E. Ex. 33[7]) In making these transfers, Ms. Abel[8] explained that the PCC is doing more than merely "equalizing workflows:"

> Q: (by LakeWood counsel) So when the PCC makes this decision to say, "Okay, well Gidson, I want you down here, okay, what factors are they taking into account?
>
> A. The patient acuity, the census at the time in the different departments, so in-patient, ER, OR. And that individuals' skills and abilities.
>
> Q: … That individual's [sic] employee's skill and ability?
>
> A: The nurse or the CNA, because we have staff who have different levels of experience and skill sets that they are more proficient at.
>
> Q: Is the PCC then making a decision about what is in the patient's best interest?
>
> A: Yes. She uses her own professional discretion and judgment to make the decision.

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[6] The first page of E. Ex. 19 is the "acuity tool," which represents a methodology for determining the number of staff needed as a function of patients' conditions (*i.e.,* the more care required, the more staff scheduled), though PCCs have discretion to vary the number if they believe a variance is appropriate. (Tr. 77/6 – 25; 77; E. Ex. 19, pp. 1 – 2) It is to be emphasized that at all times, a PCC may decide on her own whether to add additional nurses. (Tr. 231/23 – 25; 232)

[7] E. Ex. 19 and 33 are the same, and were inadvertently introduced as separate exhibits.

[8] Ms. Abel is uniquely qualified to testify about the work of the PCCs. She holds a Bachelor of Science nursing degree, is a licensed Minnesota RN, and since beginning her work at Lakewood in 2008 has performed numerous nursing assignments. She was a staff nurse for three (3) years, has given clinical instruction to LPN and CNA students; served as an EMT; became the quality and infection control nurse in 2011, and in 2014 moved to the Chief Nursing Officer position; finally, in 2014 she was promoted to her present position of Vice President of Patient Care. (Tr. 20/25; 26/1 – 15) Under LakeWood's primary nursing care model, to the present time she has occasion to step in and perform nursing duties. (Tr. 332/17 – 25)

Q: They don't have to check with somebody to make this assignment?

A: No.

(Tr. 84/4 – 21)

Another example is PCC Sarah Baade instructing an employee on May 5, 2016 to tend to a patient's IV infusion, rather than complete discharge paperwork. (Tr. 105 – 106) Had the employee not quit grousing about the PCC's directive, she would have been disciplined for insubordination. (Tr. 107/24 – 25; 108/1 – 2) The decision of the PCC about where an employee is to work is final. (Tr. 85/8 – 13) Further, the PCCs were expressly informed of their authority to make such transfers. (Tr. 85/14 – 25; 86/1 – 12)[9]

In a series of meetings with the six PCCs beginning February 18, 2016, LakeWood laid out the scope of the position and the supervisory duties it entailed. Among other items covered in these meetings were the PCC job description, with particular reference to the PCCs' authority to "initiate disciplinary action when appropriate …" (Tr. 94/6 – 24; 95/1 – 6; 95 – 96; E. Ex. 9, 21, and 22) In meeting with the PCCs on February 24, 2016, LakeWood reviewed its Corrective Action Policy, making clear their authority to impose discipline and the form they would use to document what they had done. "We explained to them," testified Ms. Abel, "that based upon their investigation, if they felt in their professional judgment that the situation warranted some type of disciplinary action, that they had the ability to do that." (Tr. 98/12 – 15; 99 – 100; E. Ex. 22, 23 and 24) PCCs understood that they had the authority to discipline:

> Q: But certainly you understood that in an appropriate – or in a situation where you thought it was appropriate, you as a PCC, could impose discipline.
>
> A: (By PCC Johnson) Yes.

[9] Transfers similar to those shown as occurring on May 10, 2016 have been made at other times. (E. Ex. 20)

(Tr. 305/14 – 17)

PCC Johnson further said that if she encountered a situation that she believed warranted discipline, she would take appropriate action inasmuch as she had accepted the responsibilities of the PCC position. (Tr. 308/9 – 16)

Fortunately, disciplinary issues at LakeWood do not arise very often. Since 2014, when Ms. Abel became Vice President of Patient Care, there have only been two discharges and they were related to one another; both took place in March 2015 – long before the PCC position became operational. (Tr. 109 – 110) Also since 2014, there have only been two suspensions, the first taking place in January 2016. (Tr. 110/17 – 25) In the second, which occurred after the PCCs commenced their duties, Ms. Abel determined that both the employee involved and the PCC, who had been responsible for the employee at the time, had mishandled the situation. The employee was suspended and the PCC was coached on what she should have done. (Tr. 101 – 102/1 – 6) PCCs will be evaluated for the first time in September 2016. (Tr. 102/7 – 11) The particular PCC who mishandled this disciplinary matter will be held accountable in her own evaluation at this time. (Tr. 102/14 – 24) Given the rarity of discharges and suspension and the newness of the position itself, PCCs would ordinarily consult with upper management before imposing such action. (Tr. 227/4 – 20) In the short time that the PCC position has functioned, there have been no situations that required that they prepare corrective action plans or issue no verbal warnings. (Tr. 229/14 – 20)

LakeWood, of course, is not an industrial enterprise in which employees are "laid off" for long periods of time. (Tr. 112/11 – 22) Employee scheduling is, rather, adjusted on a shift-by-shift basis depending on need to provide patient care. (Tr. 113/1 – 14) Ordinarily, a PCC and two other licensed nurses, whether or RN or an LPN, staff a shift, with adjustments made based

upon the patient census. (Tr. 114/4 – 13; 114 – 119; E. Ex. 26 and 27) PCCs have, however, adjusted the number of employees working. (Tr. 114/14 – 17)

The record also establishes that the PCCs must approve all shift trades in order to assure that the properly qualified employees are on site. (Tr. 123/12 – 25; 124/1 – 3; E. Ex. 28) Conversely, PCCs may reject shift trades. (Tr. 125/23 – 25) Whether or not a shift trade is approved is not merely a ministerial task. Rather, the decision requires the PCC to take into account the proposed staff's skills, ability and experience, as well as the expected patient census. (Tr. 126/7 – 19) LakeWood expressly informed PCCs of their authority to decide whether to approve a shift trade. (Tr. 127)

To assure that the hospital is at all times properly staffed, PCCs have authorized premium pay to incentivize people to work. (Tr. 128 – 129; E. Ex. 29) LakeWood's Premium Pay Policy permits only a designated Department Director/Supervisor to approve premium pay. (Tr. 129 – 131; E. Ex. 30 and 31)

Wage increases are not automatic, but are based on performance. (Tr. 132/22 – 24; 133/1 – 13) Performance, in turn, is assessed by someone's immediate supervisor, and for RNs, LPNs, and CNAs that is now a PCC. (133/16 – 25) There is a written evaluation system, "Goals Performance Succession," whereby information is electronically entered by both the employee and the supervisor. (Tr. 133/25; 134; E. Ex. 32) Ratings (1 through 5, with 5 being the best) are assigned and the average, total score determines how much of the available increase, as set by HR, an employee will receive. (Tr. 135 – 138/1 – 10) As noted above, the first opportunity that PCCs will have to complete evaluations will be in September 2016. (Tr. 139/5 – 10) No one other than a PCC will prepare a written evaluation of an employee. (Tr. 140/8 – 12) And those evaluations the PCCs prepare will be based on their independent assessment, direct observation,

and daily contact; the PCCs will not be seeking the opinion of higher management. (Tr. 164/19 – 25; 165/1 – 4) As with their other responsibilities, PCCs were informed of their authority to evaluate. (Tr. 141/20 – 23; 142/1 – 7; E. Ex. 9)

The PCCs have also given direction to employees regarding specific tasks (*e.g.,* making sure that laundry carts are emptied between rooms, handling patients' own narcotics, locating stress test packets, completing a nightshift chart, implementing discharge follow-up calls, reminding employees to have stretchers available, and to wipe down slide pads). (Tr. 149 – 154; E. Ex. 35, 36, 37, 38, 39, 40 and 41) In addition to giving direction, PCCs have responsibility for inspecting the work of their subordinates by making patient rounds and by direct observation from the nurses' station. (Tr. 158/11 – 24) Training and orienting new employees are additional responsibilities of the PCCs. (Tr. 159; E. Ex. 42) For all of the work that the PCCs assign, not only are they held accountable, but they have also been instructed that they are accountable. (Tr. 161 – 162; E. Ex. 9) On May 25, 2016, for example, Ms. Abel took a PCC to task for her staff's failure to maintain hygienic conditions, and this will factor into the PCCs' September 2016 evaluation. (Tr. 162 – 163; E. Ex. 43) However, the assignments made by the PCCs, be it to a particular department or to a patient, are not reviewed by Ms. Abel, though Acute Care Nursing Manager, Joan Baade may do so. (Tr. 163/10 – 25; 208/7 – 19) *See*, for example, E. Ex. 19, 20, 25, 26, 27, 33, and 34.

A series of meetings have been held that only PCCs have attended, which addressed issues that arise in the course of their work (*e.g.,* reviewing procedures, educating staff, refreshing clinical skills, scheduling, improving morale, and dealing with time recording). (Tr. 166/5 – 19; E. Ex. 44, 45, 46, 47) Affixed to the PCC binder, which is located at the nurses' station, is a laminated "PCC Responsibilities" work sheet. (Tr. 170/20 – 25; E. Ex. 48) The

document in bullet-point format reminds PCCs of certain functions, including the need to review shift assignments and a reminder that a PCC's role is supervisory. (E. Ex. 48)

IV. Analysis and Argument: The PCC position is supervisory

The PCC position is supervisory. The lynchpin for determining supervisory status is the statutory definition itself in section 2(11) of the Act:

> The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

The critical factor is whether the purported supervisor has the authority to exercise any one of the twelve (12) enumerated powers. *NLRB v. Health Care & Retirement Corp.*, 511 U.S. 571, 573 – 574 (1994). Section 2(11)'s definition is read in the disjunctive. *See, e.g., Children's Farm Home,* 324 NLRB 61, 65 (1997). The exercise of any one of these powers is enough to confer supervisory status. Furthermore, even if the individual "has no direct authority to take any of the twelve (12) actions enumerated … he or she is still a supervisor … if he or she possesses the authority 'to effectively … recommend any one of the 12 actions." *Buchanan Marine, L.P.,* 363 NLRB No. 58 at *4 (Dec. 2, 2015) (emphasis added).

Here, given the infancy of the PCC position, much of the focus must be on the authority vested in each the PCCs. The PCC job description instructs and authorizes, *inter alia*, that they: (1) are "responsible for daily nursing assignments; (2) provide overall supervision or of staff and patient care; (3) participate in the hiring and performance evaluation process of acute care nursing staff; (4) initiate disciplinary action when appropriate; and (5) must hold themselves as well as others accountable for LakeWood's goal attainment. This accountability, in turn, means

that PCCs may benefit financially or be adversely impacted if the work they assign is done well or poorly.

Even though the PCC position has functioned for only a short time, the PCCs have exercised supervisory duties. They have transferred employees within the hospital, exercising their own professional discretion and judgment. Not only were PCCs informed through their job description and over the course of meetings with LakeWood's management of their authority to discipline, but the PCCs themselves testified that they understood they were vested with such authority. PCCs have also approved shift trades, but have done so only after considering the staff members' respective skill, ability and expertise – in other words, their permitting shift trades is more than a merely ministerial task. To incentivize their subordinates to work additional shifts/hours, PCCs have awarded premium pay, and they have given direction regarding specific tasks they want performed.

Of particular note is the PCCs' role in preparing written evaluations of employees. The process is performed in September and October of each year, which means, of course, that the first time that the PCCs perform this duty will be later this year. They are the only ones who will prepare these written evaluations. The PCCs' responsibility to evaluate employees is neither hypothetical nor a meaningless undertaking: their written evaluations will determine whether those they rate will receive wage increases and if so how much of an increase. Although the written evaluations will not be completed until later in the year, the observation and assessment that will factor into PCCs' written documents is, of course, going on at the present time.

The substance of the Regional Director's reasoning that the PCC position is not supervisory is that they have not exercised more supervisory duties than they have to date. In doing so, he fails to recognize the nature of LakeWood's small size and the brief period for

which the PCC position has functioned. However, the fact that PCCs have not had occasion to fully exercise the full panoply of their supervisory authority does not militate against their having such authority. To be sure, the Board has said that the occasional or sporadic exercise of 2(11) powers is insufficient to confer supervisory status. However, here the PCC position has only been "live" since February 28, 2016. Indeed, what the MNA has attempted to do in this representation case is game the system. Having repeatedly asserted in government documents in Cases 18-CA-161872 and 18-CA-170429 that the PCC position was supervisory, the MNA now seeks to disavow this position and change its position entirely in the hope that the Board will: 1) ignore MNA's duplicity, and 2) draw from the scant three-month record of the PCC position that it is non-supervisory. The MNA does so despite the facts that each of the PCCs volunteered for the position; was expressly told in advance of the supervisory expectations; was awarded a significant pay increase for accepting the supervisory duties of the position, and has actually performed some, though not all, of the supervisory duties of the position in the brief time the PCC position has functioned. To conclude, as the Regional Director did, that the PCCs are not statutory supervisors because they have not to date exercised more supervisory functions than they have exalts form over substance.

The Board's "Kentucky River decisions," *Oakwood Healthcare, Inc.*, 348 NLRB 686 (2006), *Golden Crest Healthcare Center*, 348 NLRB 727 (2006) and *Croft Metals, Inc.*, 348 NLRB 717 (2006) are instructive. Each of these cases dealt with long and well-established positions for which conclusions could be drawn about their supervisory status from years, not a scant more than a three-month period. These cases did not deal with newly created positions, which had functioned for only a limited time and about which only a limited amount of information about supervisory duties was available.

LakeWood's research has located no case in which an employer's claim that a position is supervisory was denied where the position had functioned for such a short time as in the present case. Although GC Memorandum 07 – 05 (April 10, 2007) states that the evidentiary burden on the entity asserting supervisory status is "significant and substantial" and a "paper showing" alone is insufficient, that burden must take into account when the position was created, how it has functioned, and how it will function in the immediate future and the size of the supervised workforce. It would be nonsensical to conclude that a position created on day one is non-supervisory and the party asserting supervisory status has failed in its burden when the only available information about it is based on day one. Although LakeWood submits that it has demonstrated the PCC position to be supervisory, the Regional Director has taken limited and emerging information regarding the PCC position and drawn the wrong conclusion that it is non-supervisory. For example, because LakeWood is a small, rural hospital personnel issues are not as common as would be expected in a larger, more diverse setting. In *Oakwood, supra.*, by contrast, the hospital employed 181 staff RNs and was licensed for 257 beds (compared to LakeWood's fifteen (15)). The fact that there have been only two discharges and two suspensions over the last two (2) years, all occurring before the PCC position became operational, speaks only to the infrequency with which PCCs may be called upon the discipline, not to their actual authority. So, given the small size of LakeWood's operations and that the PCC position only started on February 28, 2016, it is hardly surprising that more frequent and more serious disciplinary actions have not been taken by PCCs to date. Much the same may be said for the PCCs' other indicia of supervisory authority. They have used independent judgment to assign work based on their assessment of their employees' skill, ability, and experience; they have discretion to call in additional employees; they have offered financial reward to have people

accept additional work; and they have expressly been told of their authority to carry out these functions. From the foregoing, it is clear that in the brief period in which the PCC position has functioned, the PCCs have held supervisory authority and have exercised it.

V. Conclusion

LakeWood submits that the position of Patient Care Coordinator is supervisory within the meaning of section 2(11) of the Act, and that the Board should, therefore, reverse the determination of the Regional Director that this position is not supervisory. Accordingly, the PCCs are not eligible voters.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 8, 2016, I electronically filed the foregoing with the National Labor Relations Board using the electronic filing system. I further hereby certify that I have served the attached by electronic mail upon the following person:

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